IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 16, 2006

CHARLES ARNOLD BALLINGER v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Bradley County
No. 05-028 Carroll L. Ross, Judge

No. E2005-02404-CCA-R3-PC - Filed July 18, 2006

The petitioner, Charles Arnold Ballinger, appeals the Bradley County Criminal Court's denial of his petition for post-conviction relief from his guilty plea to sexual battery by an authority figure and resulting six-year sentence as a Range II, multiple offender. He contends that he received the ineffective assistance of counsel and that his guilty plea was involuntary. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

A. Wayne Carter, Cleveland, Tennessee, for the appellant, Charles Arnold Ballinger.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; and Stephen Crump, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

According to the guilty plea hearing transcript, the petitioner's six-year-old stepdaughter alleged that he digitally penetrated her, and the petitioner made statements to his brother in which he corroborated the victim's claim. The petitioner was charged with rape of a child, a Class A felony, but pled guilty to sexual battery by an authority figure, a Class C felony. As part of the plea agreement, the petitioner was sentenced as a Range II offender with a release eligibility of thirty-five percent. Subsequently, the petitioner filed a petition for post-conviction relief, claiming that he received the ineffective assistance of counsel and that his guilty plea was involuntary.

The post-conviction court appointed counsel and held an evidentiary hearing. At the hearing,

the petitioner testified that he hired trial counsel to represent him and that they met a couple of times in counsel's office. About two days before trial, the petitioner, his mother, and his sister met with counsel. Counsel told the petitioner that he had worked out a plea agreement with the State in which the petitioner could plead guilty and receive an eight-year sentence, but the petitioner turned down the State's offer. The day before trial, counsel told the petitioner about another offer in which the petitioner could plead guilty to sexual battery by an authority figure and receive a six-year sentence to be served at thirty-five percent. The petitioner did not understand that the offer required him to plead guilty as a Range II offender, and counsel did not discuss the petitioner's being sentenced as a Range II offender with him. Counsel told the petitioner that he would "most likely do 13 months, if that," and the petitioner believed counsel was guaranteeing that he would be released from confinement after serving thirteen months. The petitioner and counsel talked about the offer, but the petitioner had only five minutes to accept it. If the petitioner had known that he would have to serve more than thirteen months in confinement, he would not have accepted the State's offer.

On cross-examination, the petitioner acknowledged that counsel may have said he would "most likely" be released from confinement after serving thirteen months. He also acknowledged having a prior conviction for statutory rape but denied that counsel told him his prior conviction could affect the parole board's decision to grant him parole in the present case. He acknowledged that his brother could have testified at trial that the petitioner confessed to penetrating the victim and that he could have received a fifteen-year sentence to be served at one hundred percent if convicted.

Carla Thompson, the petitioner's sister, testified that she attended a meeting with the petitioner and his attorney and that counsel "did offer him, you know, the plea about 35%." The petitioner pled guilty because he had a son and did not want to take a chance on going to trial and being convicted. Thompson acknowledged that counsel guaranteed the petitioner would be released from confinement in thirteen months and that the petitioner believed he would serve only thirteen months. She said the petitioner was not guilty and should not have accepted the State's offer.

Barbara Ballinger, the petitioner's mother, testified that she, her daughter, and the petitioner met with the petitioner's attorney. Counsel told the petitioner that he would probably serve two years "and, at 35%, and with good time and days off counted . . . that maybe 13 months, no more than two years." Barbara Ballinger believed counsel was guaranteeing that the petitioner would serve only thirteen months to two years in confinement. Counsel told the petitioner that if he did not accept the State's offer and was convicted at trial, he would serve a twenty- to thirty-year sentence.

The petitioner's trial counsel testified that he had been practicing criminal law for about thirty years, had been an assistant district attorney for six years, and currently worked for a law firm. The victim and her mother would not talk with counsel, but counsel learned that the victim's mother may have lied about the crime. Counsel believed that the mother's lying was the defense's best strategy, and a defense investigator tried to get information about the mother's mental history. The State initially offered to let the petitioner plead guilty in return for an eight-year sentence, but the petitioner declined that offer. A couple of days before trial, the State informed the defense that the petitioner had made admissions about the crime to his brother and sister-in-law and that the petitioner's brother

and sister-in-law had given the State audiotaped statements about the admissions. The State offered to let the petitioner plead guilty to sexual battery by an authority figure in return for a six-year sentence to be served as a Range II offender at thirty-five percent. The petitioner had a prior conviction for a felony sexual offense, and counsel was afraid the petitioner would receive a twenty-year sentence to be served at one hundred percent if convicted in the present case. Counsel and the petitioner listened to the audiotapes and "went through quite a number of calculations, trying to figure out what this sentence would mean to him." Counsel could not remember exactly what he told the petitioner, but he probably told the petitioner that he would be eligible for parole after serving thirty-five percent of the sentence. Counsel then "would have told him that he would have been eligible for parole after 25 months or so, and then that that might be cut, depending on whether he earned any good time credits, honor time credits, and depending on the general over crowdedness of the prisons at this time." He said that some clients "make bad prisoners" and that he never guaranteed his clients as to when they would be released from confinement.

On cross-examination, counsel testified that the petitioner had a "very short" time to accept the State's offer because the trial was scheduled to begin the next day. Counsel believed the petitioner had more than five minutes to accept the State's offer, that the petitioner was allowed to think about the offer overnight, and that the petitioner accepted the offer the next day. Although the petitioner's mother and sister did not want him to accept the State's offer, the petitioner decided to accept it. Counsel did not believe it was possible that the petitioner could have thought he would be released from confinement in thirteen months.

Regarding his ineffective assistance of counsel claim, the post-conviction court stated that the petitioner's attorney had "impeccable skills and qualifications" and that the petitioner had presented no evidence that he received the ineffective assistance of counsel. As to the voluntariness of his guilty plea, the post-conviction court concluded that the petitioner fully discussed the plea with his attorney and fully understood the State's offer. The court noted that at the guilty plea hearing, the petitioner stated that he understood his rights and that he understood the State's offer. The court also noted that the petitioner had served prison time for his prior statutory rape conviction and could not "claim to be a novice in his understanding of how the system works either in taking a plea in court or in serving time with the Tennessee Department of Correction[]." The post-conviction court noted that counsel testified he never guaranteed his clients as to how much time they would serve in prison. The court concluded that the petitioner knew he was facing a twenty-five-year sentence to be served at one hundred percent if convicted of child rape and that he voluntarily and knowingly accepted "the less severe of two bad choices." The post-conviction court denied the petitioner's request for post-conviction relief.

II. Analysis

The petitioner claims that he received the ineffective assistance of counsel because his trial attorney did not explain that he would be sentenced as a Range II, multiple offender and that his guilty plea was involuntary because he did not understand that he was pleading to a higher range and was misinformed about the amount of time he would actually serve in confinement. The State

claims that the trial court properly denied the petition for post-conviction relief. We agree with the State.

To be successful in his claim for post-conviction relief, the petitioner must prove all factual allegations contained in his post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). "'Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court's findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court's conclusions of law purely de novo. Id. "To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). In evaluating whether the petitioner has met this burden, this court must determine whether counsel's performance was within the range of competence required of attorneys in criminal cases. See Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). "[F]ailure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." Goad, 938 S.W.2d at 370.

When a defendant enters a guilty plea, certain constitutional rights are waived, including the privilege against self-incrimination, the right to confront witnesses, and the right to a trial by jury. Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969). Therefore, in order to comply with constitutional requirements, a guilty plea must be a "voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). In determining whether a petitioner's guilty plea was knowing and voluntary, this court must look at the totality of the circumstances. State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). "This court is bound by the post-conviction court's findings unless the evidence preponderates otherwise." Bates v. State, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997).

Initially, we note that the petitioner failed to file a timely notice of appeal. The post-conviction court denied post-conviction relief on July 5, 2005, but the petitioner did not file his notice of appeal until September 15, 2005. Tennessee Rule of Appellate Procedure 3(b) provides that a criminal defendant may appeal to this court following "a final judgment in a . . . post-conviction proceeding." Rule 4(a) of the Tennessee Rules of Appellate Procedure instructs that

"the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from." Included in the appellate record before us is an order, signed by the post-conviction court and file-stamped by the Bradley County Circuit Court Clerk, stating that the petitioner's late-filed notice of appeal "is accepted and defendant is granted permission to proceed as if filed timely." While a notice of appeal "is not jurisdictional and the filing of such document may be waived[,] . . . [t]he appropriate appellate court shall be the court that determines whether such a waiver is in the interest of justice." Tenn. R. App. P. 4(a). Therefore, the post-conviction court's order did not remedy the fact that the petitioner's notice of appeal was untimely. Nevertheless, we conclude that waiving the timely filing requirement in the instant case serves the interest of justice.

That said, we agree with the post-conviction court that the petitioner is not entitled to post-conviction relief. Although the petitioner contends that his attorney did not explain that he would be sentenced as a Range II offender and guaranteed that he would serve only thirteen months in confinement, the post-conviction court obviously accredited counsel, who testified that he discussed the State's offer with the petitioner and that he never guaranteed his clients as to when they would be released from prison. The petitioner has failed to show that he received the ineffective assistance of counsel.

As to the petitioner's claim that his plea was involuntary, counsel testified that the petitioner was allowed to consider the State's offer overnight and decided to accept the offer. In its order denying post-conviction relief, the post-conviction court referred to the petitioner's guilty plea hearing transcript, and we have reviewed the transcript. At the guilty plea hearing, the State gave a factual account of the crime and recommended that the petitioner receive a six-year sentence as a Range II offender. The petitioner's attorney then stated,

> That's correct, Your Honor, and in addition to the punishment that [the State] has already set out, Your Honor, I need to explain to the Court that had Mr. Ballinger been sentenced normally, he is not a range II offender, Your Honor, but in order to receive this plea agreement with a reduction, we have agreed to voluntarily plead at the 35% level . . . instead of the 30% level.

The trial court asked the petitioner if he understood the State's offer, and the petitioner said, "Yes, sir." We note that the petitioner rejected the State's initial offer for an eight-year sentence, but agreed to plead guilty in return for a six-year sentence to be served at thirty-five percent after learning that the State had evidence he admitted to the crime. Given the totality of the circumstances, we conclude that the petitioner has failed to show that his guilty plea was involuntary.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

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NORMA McGEE OGLE, JUDGE